

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	3:12-cr-00004-RCJ-VPC
vs.	)	
	)	
DANIEL DRAPER,	)	<b>ORDER</b>
	)	
Defendant.	)	
	)	

Defendant has received leave from the Court of Appeals to file a successive habeas corpus motion. Defendant's motion is based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*). Defendant argues the voluntary manslaughter conviction forming the basis for his conviction under § 924 was not a "crime of violence" under 18 U.S.C. § 924(c)(3) because the residual clause defining "crime of violence" is similar to the residual clause of § 924(e)(2), which the Supreme Court has struck down as unconstitutionally vague. *See Johnson II*, 135 S. Ct. at 2563. The definition of "crime of violence" applied to Defendant reads as follows, with the

1 allegedly unconstitutionally vague residual clause emphasized:

2 (3) For purposes of this subsection the term “crime of violence” means an offense  
3 that is a felony and--

4 (A) has as an element the use, attempted use, or threatened use of physical  
5 force against the person of another, or

6 (B) *that by its nature, involves a substantial risk that physical force against  
the person or property of another may be used in the course of committing  
the offense.*

7 18 U.S.C. § 924(c)(3)(A)–(B) (emphasis added). The definition of “violent felony” at issue in  
8 *Johnson* reads as follows, with the unconstitutionally vague residual clause emphasized:

9 (B) the term “violent felony” means any crime punishable by imprisonment for a  
10 term exceeding one year, or any act of juvenile delinquency involving the use or  
11 carrying of a firearm, knife, or destructive device that would be punishable by  
12 imprisonment for such term if committed by an adult, that--

13 (i) has as an element the use, attempted use, or threatened use of physical  
14 force against the person of another; or

15 (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise  
involves conduct that presents a serious potential risk of physical injury to  
another*

16 *Id.* § 924(e)(2)(B)(i)–(ii) (emphasis added). The language of the two clauses is not identical, but  
17 even assuming for the sake of argument that the difference in language is not enough to rescue  
18 § 924(c)(3)(B) from constitutional infirmity, *Johnson II* is no aid to Defendant, because the  
19 physical-force clause of § 924(c)(3)(A) applies here.

20 Manslaughter under § 1112 “has as an element the use, attempted use, or threatened use  
21 of physical force against the person of another,” *id.* § 924(c)(3)(A), because it requires an  
22 “unlawful killing,” § 1112(a). The Supreme Court has ruled that the “physical force” required is  
23 “physical force capable of causing physical pain or injury to another person.” *Johnson v. United*  
24 *States (Johnson I)*, 559 U.S. 133, 138 (2010) (interpreting the analogous physical force clause  
25 under § 924(e)(2)(B)(i)). *Johnson I* does not prevent a homicide crime from being a categorical

1 crime of violence under the physical force clause, because it is not possible to kill a person  
2 without exerting “physical force capable of causing physical pain or injury.” If the force required  
3 for a conviction of manslaughter must necessarily cause death, it must also necessarily be capable  
4 of causing injury.

5 Moreover, Congress has explicitly included “manslaughter other than involuntary  
6 manslaughter (as described in section 1112)” under the definition of “serious violent felony” for  
7 the purposes of the three-strikes rule for mandatory life imprisonment. *See* 18 U.S.C.  
8 § 3559(c)(2)(F)(i). The unavoidable conclusion is that Congress intended to include voluntary  
9 manslaughter under the definitions of “crime of violence” and “violent felony,” as well. Indeed,  
10 voluntary manslaughter is viewed by Congress not only as “violent,” but “serious[ly]” so. It is  
11 difficult to conceive how Congress could have explicitly categorized voluntary manslaughter  
12 under § 1112 as a “serious violent felony” helping to support a mandatory life sentence while not  
13 intending it to qualify as a “crime of violence” so as to support a relatively minor sentencing  
14 enhancement.

15 Force under the physical force clause must also be intentional, not merely negligent or  
16 reckless. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc). Although  
17 the Court of Appeals has noted that a defendant might be convicted for voluntary manslaughter  
18 under § 1112 without an intent to kill, i.e., where he kills recklessly but upon passion instead of  
19 malice, *see United States v. Paul*, 37 F.3d 496, 499 n.1 (9th Cir. 1994), another panel previously  
20 noted that a conviction for voluntary manslaughter under § 1112 as a lesser included offense of  
21 murder under § 1111, as here, requires proof of at least an intentional injury even if there is no  
22 intent to kill, *see United States v. Quintero*, 21 F.3d 885, 890 (9th Cir. 1994) (“To convict a  
23 defendant charged with murder of voluntary manslaughter, the government must prove that (1)  
24 the defendant *intentionally inflicted an injury upon another* from which the other died; and (2)

1 the homicide was committed without justification or excuse.” (emphasis added)).

2 A murder defendant becomes entitled to an instruction on the lesser included offense of  
3 voluntary manslaughter if he produces evidence “that the defendant was acting out of passion  
4 rather than malice.” *United States v. Begay*, 673 F.3d 1038, 1045 (9th Cir. 2011) (quoting *id.*).  
5 Another post-*Paul* panel has noted that passion and malice both imply the mental state of intent.  
6 See *Kleeman v. U.S. Parole Comm’n*, 125 F.3d 725, 731 (9th Cir. 1997) (citing *Paul*, 37 F.3d at  
7 499) (“If a defendant kills *with the mental state required for murder*, but does so in the ‘heat of  
8 passion’ caused by adequate provocation, then the defendant is guilty of voluntary  
9 manslaughter.” (emphasis added)). “*Intent without malice*, not the heat of passion, is the  
10 defining characteristic of voluntary manslaughter.” *Id.* (quoting *Quintero*, 21 F.3d at 890)  
11 (emphasis added). And it is not even clear that the *Paul* panel’s statement that voluntary  
12 manslaughter can be committed via mere recklessness as to the result of death is correct. See  
13 *Wakaksan v. United States*, 367 F.3d 639, 645 (8th Cir. 1966) (“Voluntary manslaughter is an  
14 unlawful, intentional killing committed without malice aforethought, while in a sudden heat of  
15 passion due to adequate provocation. . . . An essential element of the prosecution’s case was to  
16 establish that the appellant intentionally caused the death of the victim.”).

17 The jury instructions in this case, however, permitted a conviction based alternatively on  
18 intentional killing or recklessness, i.e., “recklessly with extreme disregard for human life.” The  
19 Circuit’s model jury instruction’s alternative recklessness language—which is based on the  
20 *Paul* case—may or may not be correct based on the weight of the case law, but it was given in  
21 this case. Still, it appears clear that a voluntary manslaughter conviction cannot have occurred  
22 without at least an intent to cause some injury, and the requirement that the defendant’s acts  
23 leading to the death of the victim be the result of “passion” or “provocation” and recklessness  
24 “with extreme disregard for human life” sufficiently communicated to the jury the requirement of

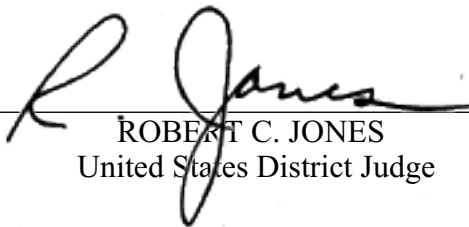
1 an intent to cause some injury to the victim. The Court realizes that the question is difficult and  
2 therefore issues a certificate of appealability.

3 **CONCLUSION**

4 IT IS HEREBY ORDERED that the Motion to Vacate, Set Aside or Correct Sentence  
5 Pursuant to 28 U.S.C. § 2255 (ECF Nos. 139, 142) is DENIED.

6 IT IS FURTHER ORDERED that a certificate of appealability is GRANTED.

7 Dated January 4, 2017.

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10 ROBERT C. JONES  
United States District Judge  
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